

**Date:** November 19, 2013

**To:** Thomas J. Bonfield, City Manager  
**Through:** W. Bowman Ferguson, Deputy City Manager  
**From:** Joel V. Reitzer, General Services Director  
**Subject:** Building and Services Agreement Between the City of Durham and the Durham Arts Council, Inc.

### **Executive Summary**

The Durham Arts Council, Inc. (DAC) provides a variety of arts programs open to and for the benefit of the arts community and general public and operates the facility owned by the City of Durham at 120 Morris Street. The City and County of Durham and the DAC cooperatively funded the renovation and restoration of the Morris St. building between 1986-1988, to revitalize Downtown Durham by developing interest and support for the arts in the City and preserving and restoring the building as a premier, professional quality arts center.

The current twenty-five year lease between the City and the (DAC) to program and operate the facility expires December 31, 2013. The City and the DAC have negotiated a new ten year Building and Services Agreement, with the option of two renewals of five years each. The new ten year Agreement provides for the term, cost and benefits to the City.

### **Recommendation**

The General Services Department recommends that City Council authorize the City Manager to enter into an Agreement with the Durham Arts Council, Inc. from January 1, 2014 through December 31, 2024, with total payment for the first term of 10 years not to exceed \$7,457,600.51 for programs and to operate the facility; and authorize the City Manager the right to extend the Contract upon the same terms and conditions for a period equal to two five year extensions. Such extensions of the Agreement may be at any point where extensions are authorized by agreement of both parties.

### **Background**

The DAC is a 501 (c) (3) non-profit organization with a mission to “promote excellence in and access to the creation, experience, and active support of the arts” for all people of our community. The DAC furthers its mission through the programming, operations and management of the Durham Arts Council Building (owned by the City of Durham) at 120 Morris Street. The DAC is the official Local Arts Agency in Durham County, and is the Designated County Partner with the State of North Carolina Arts Council. DAC currently serves over 400,000 citizens each year; a 125% increase over the last 12 years, and programs and hosts over 5,000 events in the building each year. The DAC Goal in this agreement is to solidify the long term stability and viability of the DAC, its Mission and all of the arts organizations and arts jobs in Durham that it supports.

The DAC has provided professional management, programming and operation of the DAC building via a 25 year Lease Agreement since October 14, 1988. The Lease Agreement was extended from October 14, 2013 through December 31, 2013 to complete the development of a new Program and Services Agreement. The Agreement includes fee and payment terms, use of premises, facility operation and maintenance, programming services, financial reporting requirements and performance measures.

### **Issues/Analysis**

The City and the DAC have come to agreement on the amended terms for the Building and Services Agreement. The key provisions of the Building and Services Agreement are described below:

- Term of Agreement
  - The term of the Agreement is ten calendar years, from January 1, 2014 through December 31, 2024. There is the option, upon agreement of both parties for two five year renewals.
- Fee and Payment Terms
  - The DAC will be paid \$292,479.16 on January 15, 2014 and \$32,497.68 on June 15, 2014 which is the balance of their FY 14 fee of \$649,953.68.
  - The base fee, beginning in FY 15, is \$649,500.00.
  - The payment terms will be as follows:
    - 50% to be paid July 15
    - 22.5% to be paid November 15
    - 22.5% to be paid January 15
    - 5% to be paid June 15
- Annual Fee Adjustment
  - An annual fee adjustment of up to 2.75 % as a limiting add or deduct shall apply as a maximum adjustment
  - The City will determine whether the fee will increase or decrease, based upon contract performance and/or the City's overall budget requirements
  - Should the City engage other public entities or non-profits in supporting the DAC, the City may or may not reduce its contribution in accordance with the level of support acquired through the City's means. DAC shall not be required to accept such funding or support if the DAC Board of Trustees believes that to do so would be in conflict with its mission, governance or sustainability or if it believes that accepting such support would unduly overload its staff capacity or take away from existing or planned programs and services.
- Categories of Support (beginning FY 15)
  - Facility Maintenance Fee for operation (e.g. staffing, security, etc.) and maintenance (building upkeep and cleaning) of the Facility
    - FY 15 amount: \$460,000.00
    - Facility Maintenance Fee does not change unless there are significant and required cost increases for facility operations
    - City may reward the DAC for conservation efforts, as measured by the total Utilities costs (electric, gas, water) divided by the number of people the DAC serves annually
    - Payment for Facility Maintenance is contingent upon adherence to the Facility Maintenance Plan, as reviewed quarterly by the City. This

- Agreement anticipates a two year phase-in period to complete adherence to the Facility Maintenance Plan.
- Programming Fee for support of public programs
    - FY 15 amount: \$189,500.00
    - Will not change for the term of the agreement unless there is an expansion or reduction in arts programs, as mutually agreed upon between the City and the DAC.
  - Use of Premises
    - DAC agrees to use the Property principally and primarily for the purpose of providing a variety of “arts programs” open to and for the benefit of the general public. “Arts programs” shall refer to programs for the dance, drama, music, painting, drawing, sculpture, printmaking, literature and related programs and activities for the education, cultural advancement and enjoyment of the general public.
  - Facility Maintenance
    - General Services has developed a Facility Maintenance Plan for the DAC that is incorporated into the Agreement, as a guide for facility maintenance activities
    - Use of City-developed Facility Maintenance Plan (FMP) establishes the standard to be used for maintenance
    - City shall provide quarterly review (at minimum) of adherence to the FMP
    - The City shall be responsible for warranties, roof and building envelope, and mechanical and electrical systems integrity
    - DAC shall be responsible for all other maintenance and repairs
  - “Leasehold” Improvements
    - “Leasehold” improvements as shown in Exhibit B shall be considered as part of the building
  - Annual Audit
    - An annual audit is required, but paid for by the DAC
  - Performance Measures
    - Developed by the DAC and approved by the City with progress to be reviewed by the City semi-annually. Examples of Performance Measures include:
      - Total DAC Building rental revenues generated
      - Total cost per person served by DAC: total DAC expense for the Fiscal Year divided by the total number of people served by DAC for the Fiscal Year.
      - Adherence to the Facility Maintenance Plan
  - Building Use by City
    - DAC shall make space available to the City at the DAC building at no charge to the city for space, tables or chairs

### **Alternatives**

If the agreement is allowed to expire, there would be no contracted facility operator, and in such circumstance, the City would assume operational responsibilities, or close the building. The Administration does not advise choosing this alternative.

**Financial Impact**

To date, the DAC has been paid \$324,976.84 of their annual fee for this fiscal year, equal to 50.0% of the total FY 14 appropriation for the DAC of \$649,953.68. The new ten (calendar) year Agreement (that spans eleven fiscal years) pays the DAC an additional \$292,479.16 on January 15, 2014 and \$32,497.68 on June 15, 2014. Funds in the amount stated above for the second half of FY 14 were already included in the FY14 budget for this purpose (0Z330303 728803).

The fee that will be requested in the FY 15 budget for the DAC is \$649,500.00, which will serve as the base amount for subsequent fiscal years. Over the initial ten year duration of the contract, the maximum amount to be paid to the DAC is not to exceed \$7,457,600.51. The city would make funds available in this Agreement as follows:

Maximum Payments Over Ten Years	2.75% Maximum Annual Increase
FY	Amount
14	\$324,976.84
15	\$649,500.00
16	\$667,361.25
17	\$685,713.68
18	\$704,570.81
19	\$723,946.51
20	\$743,855.04
21	\$764,311.05
22	\$785,329.60
23	\$806,926.17
24	\$601,109.56
Contract Maximum Cost	\$7,457,600.51

Minimum Payments Over Ten Years	2.75% Maximum Annual Decrease
FY	Amount
14	324,976.84
15	649,500.00
16	631,638.75
17	614,268.68
18	597,376.30
19	580,948.45
20	564,972.37
21	549,435.63
22	534,326.15
23	519,632.18
24	366,373.16
Contract Minimum Cost	\$5,933,448.51

DAC Agreement Costs in FY 24 reflect the first six months of FY24 (ending in December) as the contract expires in the middle of a fiscal year, and when any renewal would be required.

Payment terms shall be as follows: 50% to be paid July 15, 22.5% to be paid on November 15, 22.5% to be paid January 15 and the remaining 5% to be paid June 15 of each fiscal year.

**SDBE Summary**

The item was not reviewed by the Department of Equal Opportunity/Equity Assurance for compliance with the Ordinance to Promote Equal Business Opportunities in City Contracting.

Attachments: Durham Arts Council Building and Services Agreement  
Exhibit A: Facility Maintenance Plan Table of Contents and Inspections  
Checklists  
Exhibit B: DAC FF+E and "Leasehold" Improvements Lists  
Exhibit C: City Owned FF+E at DAC